

Homosexual Policy For Commanders, Judge Advocates and Law Enforcement Personnel

Homosexual Policy

- Policy concerning homosexuals serving in the Armed Forces has been codified in 10 United States Code 654
 - ◆ Based on Congressional findings
 - ◆ 28 Feb 94 implementation
- Conduct-based
- Commander focused

Homosexual Policy

- The law:
 - ◆ Homosexual orientation alone is not a bar to service
 - ◆ Homosexual conduct is incompatible with military service
- The phrase “don’t ask - don’t tell” is not a complete or accurate description of the policy and has fostered some misconceptions

Accessions

- Applicants are not asked about sexual orientation
 - ◆ “Don’t ask”
- Applicants are informed of the policy
 - ◆ Acknowledge understanding in writing
- Homosexual conduct may bar entry

Continued Service

- Sexual orientation is not a bar to continued service unless manifested by “homosexual conduct,” defined as:
 - ◆ Homosexual acts
 - ◆ Verbal or nonverbal statement(s) that a member is homosexual
 - ◆ Creates rebuttable presumption
 - ◆ Marriage, or attempted marriage to someone of the same sex

DoD Policy: “Homosexual Act”

- Definition of “homosexual act”
 - ◆ Bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in a homosexual act

DoD Policy: “Homosexual Statement”

- Definition of “homosexual statement”
 - ◆ A statement that a member is a homosexual or bisexual, or words to that effect or language or behavior that a reasonable person would believe is intended to convey the statement that a person engages in or has a propensity or intent to engage in homosexual acts.
 - ◆ Examples: “I am gay,” “I am a homosexual,” “I have a homosexual orientation,” etc.

Rebuttable Presumption

- Statements of homosexuality create a rebuttable presumption that the member engages in homosexual acts or has a propensity or intent to do so
 - ◆ Member has burden of rebutting presumption
 - ◆ A “propensity” is defined as a likelihood

Commander Inquiries

- Commanders cannot initiate an inquiry solely to determine sexual orientation
- A prerequisite to an inquiry is:
“credible information” (a reasonable belief) that a basis for discharge exists
- The policy creates no substantive or procedural rights for the individual member

Commander Inquiries

- Only commanders can initiate fact finding inquiries
 - ◆ Can conduct inquiry personally or through an appointee (in writing)
 - ◆ The person to whom a report of homosexuality is made must be careful not to engage in an inquiry prior to the time the commander appoints
 - ◆ Not every case requires an inquiry

Commander Inquiries

■ USAF policy is:

- ◆ Prior to initiating an inquiry into alleged homosexual conduct, Wing commanders who are not also general court-martial (GCM) convening authorities must consult the first GCM in the chain of command
 - ◆ Commanders are encouraged to seek the advice of their staff judge advocates
- ◆ Single base GCM not required to, but may consult the next higher level GCM

Commander Inquiries

■ Statements cases:

- ◆ Prior to initiation of a “substantial inquiry” in a statements case, the inquiry must be approved by the Under Secretary of the Air Force, through command channels
- ◆ “Substantial inquiry” = one in which questioning of witnesses extends beyond the member (or the person reporting the statement), persons named by the member and the supervisory chain of command

Commander Inquiries

- Inquiry officers must:
 - ◆ Limit the scope of the inquiry to the conduct forming the basis for separation
 - ◆ Advise the member of the policy on homosexual conduct and, if appropriate, of the member's rights under Article 31 of the UCMJ

DoD Policy: “Credible Information”

- “Credible Information” exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a member engaged in homosexual conduct. Must be based on articulable facts and cannot be based on mere conjecture or suspicion.

OSI/SP Investigations

- No investigations solely to determine sexual orientation
- Prerequisite: credible information that a crime has been committed
 - ◆ Homosexual statements are not criminal acts
 - ◆ Not every homosexual act is a crime
- OSI commanders may decline to open a case, SF commanders cannot (AFI 31-206, para 2.21 requires request to be in writing)

OSI/SP Investigations

- DoDI 5505.8 is a limitation on the use of investigative resources
 - ◆ Preference for commander inquiries in unaggravated sexual misconduct cases
 - ◆ AFI 31-206, SF will investigate upon written request of commander
 - ◆ OSI will not investigate even upon request of commander unless there is an independent determination of credible evidence of sexual misconduct and it is in keeping with policy

DoD Policy: Administrative Separation

- If administrative separation action is initiated, the member is entitled to:
 - ◆ An administrative board hearing (can be waived)
 - ◆ Representation by free military counsel and/or civilian counsel at member's expense
 - ◆ The right to present relevant evidence and call witnesses to testify at the board hearing

Security Clearance Investigations

- Security Clearance Investigations
 - ◆ Private consensual sexual acts with adults shall not be referred or reported by security clearance investigators to law enforcement or the Military Departments for any purpose, unless aggravating factors exist
 - ◆ Information about or statements of sexual orientation shall not be referred or reported by security clearance investigators to law enforcement or the Military Departments for any purpose

Recoupment

- Recoupment is authorized if:
 - ◆ Acts either violate UCMJ or an “Under Other Than Honorable Conditions” discharge is authorized
 - ◆ Statement/marriage is for the purpose of seeking separation
 - ◆ Coordination required for substantial inquiries in statements cases
- Findings are made by administrative boards, the separation authority or SAF/MIB depending on the type of case
- Members generally have the right to contest a determination of liability and submit evidence to an investigating officer

DoD Policy: Reporting Harassment

- If a member is threatened or harassed because they have been labeled or are perceived to be a homosexual, they have every right to report the threat or harassment to authorities
- The mere fact that an individual has reported a threat or harassment cannot form the basis for an inquiry into his or her sexual orientation
- Even if information of homosexual conduct arises, the inquiry into the threat or harassment must continue

DoD Policy: Harassment

- It is Air Force policy to treat all individuals with dignity and respect, free of threats or harassment
- Even though the law requires separation of members who engage in homosexual conduct, harassment or threats are not acceptable responses to homosexual conduct
- If commanders are informed of homosexual conduct during the course of an inquiry into harassment, they must carefully consider the source of the information and the surrounding circumstances prior to initiating an inquiry into the alleged conduct (there must be credible evidence)

DoD Policy: Summary

- Sexual orientation is not a bar to service
- Homosexual conduct, defined as acts, statements or marriage, is incompatible with military service and is a basis for discharge
- All personnel must be treated with dignity and respect, free of threats or harassment